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No. 03-1160

IN THE

Supreme Court of the United States

AZEL P. SMITH, *et al.*,
Petitioners,

v.

CITY OF JACKSON, MISSISSIPPI, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

ANN ELIZABETH REESMAN
McGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth St., N.W., Suite 1200
Washington, DC 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

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BRIEF *AMICUS CURIAE* OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL IN SUPPORT OF RESPONDENTS

The Equal Employment Advisory Council respectfully submits this brief *amicus curiae* in support of Respondents City of Jackson, Mississippi, *et al.*[1] Written consent of all parties has been filed with the Clerk of the Court.

INTEREST OF THE *AMICUS CURIAE*

The Equal Employment Advisory Council (EEAC) is a nationwide association of employers organized in 1976 to promote sound approaches to eliminating discriminatory

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[1] Counsel for *amicus curiae* authored this brief in its entirety. No person or entity, other than the *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation of the brief.

employment practices. Its membership comprises over 330 of the nation's largest private sector corporations. EEAC's directors and officers include many of industry's leading experts in the field of equal employment opportunity. Their combined experience gives EEAC an unmatched knowledge of the practical, as well as legal ramifications of equal employment opportunity policies and requirements. EEAC's members are firmly committed to the principles of non-discrimination and equal employment opportunity.

All of EEAC's members are employers subject to the Age Discrimination in Employment Act of 1967 (ADEA), *as amended*, 29 U.S.C. §§ 621 *et seq.*, and other equal employment opportunity statutes and regulations. As employers, and as potential targets of employment discrimination charges and lawsuits, EEAC's members have a substantial interest in the issue presented for the Court's consideration in this case—*i.e.*, whether the "disparate impact" theory of discrimination is available under the ADEA.

EEAC members' interest in this issue is rooted in important, practical concerns. As a result of aging and normal career advancement patterns, older workers as a group tend to hold higher-level, higher-paid, and longer-established positions of employment, and to have different levels of experience and different kinds of skills and abilities, than their younger counterparts. Because of these natural correlations, innumerable business decisions and practices, even though age-neutral in intent, inevitably tend to impact older workers differently than younger ones. Some of these decisions and practices work to the older workers' advantage; others tend to benefit younger workers. Examples of the latter could include workforce reductions designed to cut salary and benefit costs; business restructurings designed to make organizations less top-heavy; plant-closings and relocations of operations accompanied by significant personnel turnover; changes in technologies and methods of operation that require

workers with new or different skills; and salary adjustments designed to improve hiring and retention of employees in entry-level and relatively low-level positions, to name just a few. A rule of law forbidding employers to implement such changes, or forcing employers to justify such decisions by proving business necessity—and perhaps to refute claims that alternatives with less age-based adverse impact exist—would severely impair the ability of EEAC members and other employers to manage their businesses.

EEAC members also are concerned about the issue at stake in this case because of the enormous practical difficulties of applying disparate impact analysis in the ADEA context. Because aging is progressive, the age composition of every employer's workforce is in constant flux, and the impact of any employment practice or business decision on employees in different age groupings is constantly changing. Consequently, a rule making employers liable for unintended consequences of employment practices that fall more heavily on an older group would effectively require employers to engage in constant monitoring and to make endless statistical comparisons of the impact of virtually every conceivable criterion and practice on employees of every age, and no employer could ever be certain of being in compliance for more than a day at a time.

Because of such concerns, EEAC over the years has filed *amicus* briefs addressing this issue in several other cases before this Court and in various circuit courts.[2] EEAC also has participated in a number of other cases before this Court

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[2] *E.g.*, *Adams v. Florida Power Corp.*, No. 01-584, *cert. dismissed as improvidently granted*, 507 U.S. 604 (2002) (per curiam); *Frank v. United Airlines, Inc.*, No. 00-948, *cert. denied*, 532 U.S. 914 (2001); *Hiatt v. Union Pac. R.R. Co.*, 65 F.3d 838 (10th Cir. 1995); *EEOC v. Borden's, Inc.*, 724 F.2d 1390 (9th Cir. 1984).

involving the ADEA.[3] In short, EEAC has substantial interest in, and familiarity with, the issues and policy concerns presented to the Court in this case. Because of its experience in these matters, EEAC is well-suited to brief the Court on implications of the issues extending beyond the immediate concerns of the parties.

STATEMENT OF THE CASE

This case involves a performance pay plan implemented by the City of Jackson police department. The petitioners are police and public safety officers, all over the age of 40 when the plan was implemented. They challenge the plan under the ADEA, alleging violations under both the "disparate treatment" and "disparate impact" theories of discrimination. According to the petitioners, the plan gave proportionately larger raises to officers and dispatchers with five or fewer years of tenure than to those with more than five years of tenure.

In their disparate impact claim, the petitioners contend that, regardless of its motives, the department violated the ADEA in implementing the plan, because its effects were less favorable to officers and dispatchers 40 years of age and older than to their younger counterparts. They note that most of those 40 and older had more than five years of tenure, while most with five or fewer years of tenure were younger than 40.

The district court granted summary judgment for the city. On appeal, the Fifth Circuit affirmed the judgment insofar as it dismissed the disparate impact claim.[4] The court

[3] *E.g.*, *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993); *Public Employees Ret. Sys. v. Betts*, 492 U.S. 158 (1989); *Shell Oil Co. v. Dartt*, 434 U.S. 99 (1977) (per curiam).

[4] The court of appeals vacated the district court's judgment insofar as it dismissed the disparate treatment claim. It concluded that the district court had acted prematurely in granting summary judgment on that claim, because it had not yet ruled on pending discovery motions in which the

thus joined the four other circuits that have ruled that the disparate impact theory is not available as a means of proving discrimination under the ADEA.[5]

SUMMARY OF ARGUMENT

The court below was correct in holding that the disparate impact theory of discrimination cannot be used to establish a violation of the ADEA. The disparate impact theory is rooted in considerations of history and policy that lie at the heart of Title VII of the Civil Rights Act of 1964, but have no parallel in the ADEA. Title VII rests on the premise that race and other immutable characteristics have no intrinsic bearing on ability. Hence, shortfalls in minority groups' performance on standardized tests and other measures of ability are seen as results of "built-in headwinds" of the historic discrimination Title VII was designed to eradicate. *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

The ADEA, however, is grounded on a fundamentally different premise—*i.e.*, not that age bears no relation to ability, but rather that its effects on ability vary so from one individual to another that it is arbitrary and unfair to base employment opportunities on age-based generalizations. *See EEOC v. Wyoming*, 460 U.S. 226, 230-31 (1983). Thus, the

plaintiffs had sought to compel production of evidence that arguably could have been relevant to the disparate treatment issue.

[5] *See Mullin v. Raytheon Co.*, 164 F.3d 696 (1st Cir. 1999); *EEOC v. Francis W. Parker Sch.*, 41 F.3d 1073 (7th Cir. 1994); *Ellis v. United Airlines, Inc.*, 73 F.3d 999 (10th Cir. 1996); *Adams v. Florida Power Corp.*, 255 F.3d 1322 (11th Cir. 2001). *See also DiBiase v. SmithKline Beecham Corp.*, 48 F.3d 719 (3d Cir. 1995) (questioning viability of ADEA disparate impact claims in dicta); *Lyon v. Ohio Educ. Ass'n*, 53 F.3d 135 (6th Cir. 1995) (same). *But see Frank v. United Airlines, Inc.*, 216 F.3d 845 (9th Cir. 2000) (holding disparate impact theory available under ADEA); *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102 (2d Cir. 1997) (approving limited form of disparate impact claims under ADEA); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948 (8th Cir. 1999) (same).

focus of the ADEA's prohibitory section is on age stereotyping, a form of discrimination that is fully addressed by the disparate treatment theory. As this Court aptly put it in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), "Disparate treatment . . . captures the essence of what Congress sought to prohibit in the ADEA."

The similarity in the wording of Title VII's and the ADEA's prohibitory sections does not afford a sufficient reason to import the disparate impact theory of the former into the age discrimination context of the latter. When Congress borrowed language from Section 703(a) of Title VII as a pattern for Section 4(a) of the ADEA in 1967, *Griggs* had not yet been decided, and Title VII generally was understood to cover only intentional discrimination. That understanding reflects a natural reading of statutory language that makes it unlawful to discriminate against or to limit, segregate, or classify employees "because of" personal characteristics, such as race, sex or age. That this Court subsequently found extra-textual reasons to give that language a more expansive reading in *Griggs*, against the unique background of Title VII, does not warrant applying the same gloss to the similar language of the ADEA.

Differences in other provisions of the two statutes reinforce the conclusion that the ADEA's prohibitory language does not reach beyond intentional discrimination. One key difference is the inclusion in the ADEA of a provision that has no counterpart in Title VII—*i.e.*, Section 4(f)(1) of the ADEA, which expressly permits differentiation in employment "based on reasonable factors other than age." 29 U.S.C. § 623(f)(1). As this Court has observed, Congress included that provision in the ADEA specifically "to insure that employers were permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. at 232-33. To allow disparate impact claims based on age-neutral criteria that merely correlate with age would effectively negate that

assurance, and thus cannot be what Congress intended in enacting the ADEA.

Unlike Title VII, moreover, the text of the ADEA draws an explicit distinction between "arbitrary age discrimination" and "problems arising from the *impact* of age on employment" and adopts different approaches to dealing with these two separate problems. 29 U.S.C. § 621(b) (emphasis added). It addresses "arbitrary age discrimination" through prohibitory measures, but declares a proactive federal policy "to help employers and workers find ways of meeting the problems arising from the impact of age on employment." *Id.*

Beyond these textual and historic differences, there are compelling public policy reasons to conclude that the ADEA's prohibitory language should not be given the same expansive reading as Title VII's. As a practical matter, the disparate impact theory is fundamentally unsuitable for use in ADEA cases. Were this Court to recognize disparate impact claims under the ADEA, employers would be severely hampered in their ability, for instance, to manage business downturns through the use of layoffs or reductions in force. Moreover, because age is not a static, group trait like the immutable characteristics protected under Title VII, but rather is progressive and individual, the age composition of the class protected under the ADEA is constantly changing, as is the age composition of every subgroup within that protected category. The result is to make it exceedingly difficult to monitor employment practices for age-based disparate impact, and virtually impossible for employers to achieve and maintain statistical parity by age.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY CONCLUDED THAT TITLE VII'S "DISPARATE IMPACT" DOCTRINE DOES NOT EXTEND TO THE ADEA

After a careful and well-reasoned analysis of the "well-traversed arguments on either side of this debate," *Smith v. City of Jackson*, 351 F.3d 183, 187 (5th Cir. 2003), *cert. granted*, 124 S. Ct. 1724 (2004), the court below correctly concluded that the "disparate impact" theory of discrimination developed by the courts under Title VII of the Civil Rights Act of 1964, and subsequently adopted by Congress in a 1991 amendment to that statute,[6] cannot properly be extended to cases of age discrimination under the ADEA. That conclusion finds strong support in the differences in the history and purposes of Title VII and the ADEA, as well as in textual differences between the two statutes.

A. The Considerations of History and Policy That Led This Court To Read Title VII Expansively in *Griggs* To Reach Facially-Neutral Practices That Operate as "Built-in Headwinds" to Minorities Have No Parallels in the History and Policies of the ADEA

Neither the language of the ADEA, nor the original Title VII language after which the ADEA's prohibitory provisions were patterned, contains any reference to disparate impact. Rather, the disparate impact theory of discrimination is a judicially-created doctrine based on an interpretation of Congress' intent in enacting Title VII. *See Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

[6] 42 U.S.C. § 2000e-2(k)(1)(A)(i).

In construing Title VII in *Griggs* to reach not only intentional discrimination, but also the use of standardized tests, diploma requirements and other employment policies and practices that are fair in form but have disparate impact against African-Americans and other minority groups protected by that statute, this Court looked past Title VII's prohibitory language and focused primarily on its unique history and broad remedial purposes. Writing for the unanimous Court, Chief Justice Burger emphasized the objective of that statute "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees." *Id.* at 429-30. Observing that "[b]asic intelligence must have the means of articulation to manifest itself fairly in a testing process," the Court traced the disparate impact of the standardized tests and diploma requirements at issue in *Griggs* directly to a long history of "inferior education in segregated schools," *id.* at 430, that operated as "'built-in headwinds' for minority groups." *Id.* at 432.

Implicit in *Griggs* is a recognition that race and other immutable characteristics protected by Title VII have no intrinsic bearing on basic intelligence or ability. Therefore, disparities in protected groups' performance on standardized tests and other purported measures of ability must be seen as lingering effects of the historic discrimination Title VII was enacted to eradicate. It was against this background that the Court concluded in *Griggs* that "Congress directed the thrust of [Title VII] to the *consequences* of employment practices, not simply the motivation." *Id.*

The ADEA, however, rests on a fundamentally different premise. It does not presume that age and ability are completely unrelated. Indeed, such a proposition would fly in the face of common experience. For example, one need only consider the occasional sports-page paean to some ex-

ceptional athlete who has managed to continue competing past the age of 40 to be reminded that most ordinary mortals' physical strength and endurance tend to wane as age advances.[7]

Nor is the ADEA predicated on any history of widespread, discriminatory animus of the sort that led to the enactment of Title VII. On the contrary, as this Court observed in *EEOC v. Wyoming*, 460 U.S. 226, 231 (1983), Congress recognized in enacting the ADEA that "age discrimination rarely was based on the sort of animus motivating some other forms of discrimination." *Cf. Kimel v. Florida Bd. of Regents*, 528 U.S. 62, 83 (2000) ("Older persons . . . unlike those who suffer discrimination on the basis of race or gender, have not been subjected to a 'history of purposeful unequal treatment'") (citations omitted).

Instead, the focus of the ADEA is on the unfairness of generalizing about individuals' abilities based on their age, rather than looking at their *actual* abilities. As this Court recognized in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 610 (1993), "Congress' promulgation of the ADEA was prompted by its concern that older workers were being deprived of employment on the basis of inaccurate and stigmatizing stereotypes." *Id.* at 610. Accordingly:

> [T]he ADEA commands that 'employers are to evaluate [older] employees . . . on their merits and not their age.' The employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly.

Id. at 611 (citation omitted).

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[7] *E.g.*, Michael Virtanen, *Older Athletes Test Their Stamina*, Assoc. Press, Nov. 12, 2003; Martin Miller, *Raising the Bar at 40*, L.A. Times, Sept. 29, 2003; Eric Neel, *Forever Young*, ESPN.com, Apr. 26, 2002, *available at* http://espn.go.com/page2/s/neel/020426.html, at 1 ("John Stockton . . . is 40 and he's playing point [guard] in the [NBA] playoffs . . . . Wrap your mind around that for a minute").

In sum, the ADEA's prohibitions are aimed at the problem of stereotyping, a form of discrimination that is fully addressed under the disparate treatment theory. For in the absence of a discriminatory motive, "the problem of inaccurate and stigmatizing stereotypes disappears . . . even if the motivating factor is correlated with age." *Id.* Thus, the disparate impact theory "captures the essence of what Congress sought to prohibit in the ADEA," *id.* at 610, and is fully sufficient to the effectuation of the ADEA's purposes, without importing the more problematic disparate treatment theory from the jurisprudence of Title VII.

B. The Language and Legislative History of the ADEA Preclude Disparate Impact Claims

1. *A Natural Reading of Section 4(a) Indicates It Prohibits Only Intentional Discrimination*

Section 4(a), the prohibitory section of the ADEA, states in pertinent part that it shall be unlawful for an employer:

> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment *because of* such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, *because of* such individual's age.

29 U.S.C. § 623(a) (emphasis added). "A commonsense reading of this statement strongly suggests that the statute includes a requirement of intentional discrimination." *Mullin v. Raytheon Co.*, 164 F.3d 696, 700 (1st Cir. 1999). Indeed, as one appeals court has observed, "[i]t would be a stretch to read the phrase 'because of such individual's age' to prohibit incidental and unintentional discrimination that resulted because of employment decisions which were made for reasons

other than age." *Ellis v. United Airlines, Inc.*, 73 F.3d 999, 1007 (10th Cir. 1996).

2. *The Similarity Between the Language of Section 4(a) of the ADEA and Section 703(a) of Title VII Is Not a Sufficient Reason To Import the Disparate Impact Theory of Title VII into the ADEA*

The few courts that have found room in the ADEA for disparate impact claims have relied heavily on the similarity between the wording of Section 4(a) of the ADEA, 21 U.S.C. § 623(a) and that of Section 703(a) of Title VII, 42 U.S.C. § 2000e-2(a). *See Frank v. United Airlines, Inc.*, 216 F.3d 845, 856 (9th Cir. 2000); *Smith v. City of Des Moines*, 99 F.3d 1466, 1469-70 (8th Cir. 1996); *Lowe v. Commack Union Free Sch. Dist.*, 886 F.2d 1364, 1369 (2d Cir. 1989). There is no doubt that, in enacting the ADEA in 1967, Congress used the language of Section 703(a) of Title VII as a model. Importantly, however, that was four years *before* this Court handed down its decision in *Griggs*. Up to that point, discrimination had been defined in the law primarily in cases construing the Equal Protection Clause of the Fourteenth Amendment, which had equated it with adverse action motivated by unlawful intent. *See Washington v. Davis*, 426 U.S. 229, 238-48 (1976). Accordingly, it is reasonable to infer that such intentional discrimination, and not disparate impact, was what Congress had in mind in 1967 when it modeled the prohibitory language of the ADEA after that of Title VII.

3. *The "Reasonable Factors Other Than Age" Exception of Section 4(f)(1) of the ADEA Further Confirms Congress' Intent To Prohibit Only Intentional Age Discrimination*

The conclusion that Congress intended the ADEA to prohibit only intentional discrimination because of age is reinforced by the inclusion in the ADEA of provisions that

further define the contours of that statute, but have no parallel in Title VII. Chief among these is Section 4(f)(1) of the ADEA, which provides in pertinent part that "it shall not be unlawful for an employer . . . to take any action otherwise prohibited [by Section 4(a)] . . . where the differentiation is based on reasonable factors other than age." 29 U.S.C. § 623(f)(1).

As this Court has pointed out, Congress included this "reasonable factors other than age" (RFOA) exception in the ADEA specifically "to insure that employers were permitted to use neutral criteria not directly dependent on age." *EEOC v. Wyoming*, 460 U.S. at 232-33. Lest there were any doubt, this Court subsequently made clear that neutral criteria cannot be deemed to be dependent on age simply because they are "*correlated* with age." *Hazen Paper v. Biggins*, 507 U.S. at 611 (emphasis added).

In other words, while the RFOA exception "makes clear that '[t]he employer cannot rely on age as a proxy for an employee's remaining characteristics, such as productivity, but must instead focus on those factors directly,'" *Kimel*, 528 U.S. at 88 (quoting *Hazen Paper*, 507 U.S. at 611), it also insures that when an employer *does* rely directly on a factor other than age, such as productivity, the employer cannot be found in violation of the ADEA simply because the factor it relied on has disparate impact against older workers. Thus, the RFOA exception contained in Section 4(f)(1) is simply incompatible with an interpretation of Section 4(a) that would allow disparate impact claims under the ADEA.

Further support for this conclusion can be drawn from the Court's interpretation of a similar statutory provision—the "factor other than sex" provision of the Equal Pay Act (EPA)—in *County of Washington v. Gunther*, 452 U.S. 161 (1981). In *Gunther*, the Court held that the Bennett Amendment to Title VII, which prohibits wage discrimination claims where the pay differential in question is authorized by

the EPA, effectively incorporates into Title VII the EPA's four affirmative defenses, including the defense for differentials based on "any other factor other than sex." 29 U.S.C. § 206(d)(1). The Court rejected the argument that the defense already was implicit in Title VII, and stated that the defense "could have significant consequences for Title VII litigation [involving alleged sex-based pay discrimination]." *Gunther*, 452 U.S. at 170. In doing so, the Court intimated that the "factor other than sex" defense was inconsistent with the *Griggs* disparate impact doctrine and suggested that the defense appeared to have been designed to limit the application of the EPA to disparate treatment claims. *Id.* at 170-71.

The Court noted in *Gunther* that Title VII was designed not only to prohibit "overt discrimination," but also to proscribe "practices that are fair in form, but discriminatory in operation." *Id.* (citation omitted). In contrast, the Court observed:

> The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex."

Id. (citation and footnote omitted). The Court concluded that, unlike Title VII, the EPA was structured to prohibit only intentional, sex-based discrimination. Thus, an employer that makes a compensation decision based on some "factor other than sex" will not violate the EPA, even if that factor has a disproportionately adverse impact on women.

Noting the similarity between the EPA's "factor other than sex" defense and the ADEA's "reasonable factor other than age" exception, several courts have recognized *Gunther* as

further support for disallowing disparate impact claims under the ADEA. *See Mullin v. Raytheon Co.*, 164 F.3d at 702; *Ellis v. United Airlines*, 73 F.3d at 1008; *Smith v. City of Jackson*, 351 F.3d at 192. The First Circuit said in *Mullin*:

> When the ADEA's general prohibition and the statutory exception are read in *pari materia*, as a unified whole, the prohibition forbids disparate treatment based on age and the exception authorizes disparate impact. Thus, Professor Laycock's commentary, made in the Equal Pay Act context, applies equally to the ADEA: "The prohibition and the exception appear identical. The sentence is incomprehensible unless the prohibition forbids disparate treatment and the exception authorizes disparate impact."

Mullin, 164 F.3d at 702 (quoting Douglas Laycock, *Continuing Violations, Disparate Impact in Compensation, and Other Title VII Issues*, 49 L. & Contemp. Prob. 53, 55 (1986)). *Cf. Markham v. Geller*, 451 U.S. 945, 949 (1981) (Rehnquist, J., dissenting from denial of petition for writ of certiorari) (noting that the ADEA "provides that it shall not be unlawful for an employer to take any action otherwise prohibited 'where the differentiation is based on reasonable factors other than age'").

The use of the word "reasonable" in the RFOA provision is fully consistent with the conclusion that the provision precludes disparate impact claims under the ADEA. Both the term "bona fide"—used by this Court in *Gunther* to describe the "factor other than sex" defense under the EPA—and the term "reasonable"—as it is used in the ADEA's RFOA exception—in essence describe the same concept in the context of employment policies and practices. Both denote, in this context, a factor that is legitimate on its face and not asserted as a pretext for intentional discrimination. Indeed, this Court's Title VII "disparate treatment" decisions use the term "reasonable" in this same way, often equating it with

a rational or facially-legitimate explanation for an employment decision or practice. *See, e.g.*, *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973) (noting that if plaintiff has produced enough evidence of unlawful intent to survive directed verdict, employer must offer "a *reasonable* basis" for its action) (emphasis added). Thus, the phrase "reasonable factor other than" in the ADEA has essentially the same meaning as "other factor other than" in the EPA, and therefore has the same preclusive effect on disparate impact claims.

The First Circuit also noted in *Mullin* that, since Title VII contains no provision comparable to the ADEA's RFOA exception, "this difference in the statutory schemes further distinguishes *Griggs*." 164 F.3d at 702 n.5. In the same vein, the Fifth Circuit declared in this case:

> At the very least, we recognize the "reasonable factors other than age" exception is a clear textual difference between the ADEA and Title VII regarding employer liability—a distinction that, if nothing else, plainly contradicts the argument that the cognizability of a disparate impact claim under Title VII (as set forth in *Griggs*) controls the cognizability of a disparate impact claim under the ADEA.

Smith v. City of Jackson, 351 F.3d at 193 (footnote omitted).

4. *The Legislative History of the ADEA Reflects Congress' Determination To Deal With Disparate Impact in the Age Context Through Proactive Programs, Rather Than Prohibitory Measures*

As this Court recounted in *EEOC v. Wyoming*, 460 U.S. at 229-33, the passage of the ADEA was strongly influenced by the contents of a 1965 report submitted to Congress by then-Secretary of Labor Willard Wirtz in accordance with a

directive incorporated in Title VII.[8] After conducting a study of the factors that tended to result in age discrimination in employment, Secretary Wirtz concluded:

> The gist of the matter is that "discrimination" means something very different, so far as employment practices involving age are concerned, from what it means in connection with discrimination involving—for example —race. It means in connection with the age question, furthermore, several different things.

Secretary's Report at 5.

The report went on to draw a distinction between what it termed "arbitrary discrimination" on the basis of age—*i.e.*, discrimination based on assumptions about people's ability resulting from age-based stereotypes—and problems resulting from factors that "affect older workers more strongly as a group than they do younger workers." *Id.* at 11.[9] The latter type of problem, which the report also described as "institutional arrangements that indirectly restrict the employment of older workers," plainly equates to practices that have disparate impact on the basis of age. *Id.* at 15.

It is highly significant, therefore, that the report recommended two distinctly different approaches to these two problems. It recommended that "arbitrary discrimination" on the basis of age be prohibited by federal legislation, but that

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[8] U.S. Dep't of Labor, *The Older American Worker—Age Discrimination in Employment*, Report to Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965), *reprinted in* Hearings on H.R. 10634 and Similar Bills Before the Select Subcom. on Labor of the House Comm. on Education and Labor, 89th Cong., 1st Sess. 201-29 (1965) (hereinafter cited as "Secretary's Report").

[9] As examples of such factors, the report mentioned health differentials between younger and older workers, the lower educational attainment of older workers, changes in technology, and possible lowering of productivity. Secretary's Report at 15.

the problem of institutional arrangements that disadvantage older workers be addressed through programmatic measures such as training and education to prepare workers for job changes and reduce their vulnerability to displacement. *Id.* Most significantly, for present purposes, the report did *not* recommend that Congress outlaw those practices that "affect older workers more strongly as a group." *Id.* at 21-22.

Congress ultimately adopted this two-pronged approach in the ADEA and expressly outlined it in the legislation's Statement of Findings and Purpose. 29 U.S.C. § 621. The dual aspects of the problem, as previously delineated in the Secretary's Report, are recognized in the ADEA's finding that "the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons." 29 U.S.C. § 621(a)(2). Yet only one of those aspects—"arbitrary discrimination in employment because of age"—is recognized as "burden[ing] commerce and the free flow of goods in commerce." 29 U.S.C. § 621(a)(4). It follows that Congress did not view the problem of "practices [that] may work to the disadvantage of older persons" as a burden on interstate commerce to be encompassed by the ADEA's prohibitory provisions. 29 U.S.C. § 621(a)(2).

This conclusion is confirmed in the Act's declaration of purpose. Section 2(b) of the ADEA states:

> It is therefore the purpose of this chapter to promote the employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b). Again, this declaration reconfirms that, just as Secretary Wirtz had recommended, Congress aimed the ADEA's prohibitory provisions only at "arbitrary employment discrimination," while addressing "impact of age on employment" through proactive measures.

II. DISPARATE IMPACT ANALYSIS IS FUNDAMENTALLY UNSUITABLE FOR USE IN ADEA CASES

A. Monitoring the Impact of Employment Decisions by Age Is Impracticable and Would Not Yield Meaningful Information

Disparate impact analysis under Title VII depends on statistics comparing the effects of employment policies or practices on different, specific protected groups—*e.g.*, the effect of a given hiring criterion on African-Americans compared to its effect on whites, or the effect of an employer's reduction-in-force criteria on women compared to their effect on men. Unlike the immutable traits covered by Title VII, however, age is a progressive condition that affects everyone, but in different degrees and at different times. Most workers eventually attain the age of 40, joining the class of individuals protected under the ADEA, and continue to age with the passage of time. As a result, the class of all ADEA-protected individuals changes each day. In 2004, for instance, an estimated 12,263 people in the United States (6,055 men and 6,208 women) on average turned 40 each day.[10] Given the inherent mutability of age, it is impossible to associate a single business decision or event with any single age-protected group.

Prudent employers typically monitor the impact of their selection practices on minorities and women as an early warning device to avoid potential liability under Title VII. If

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[10] Employment Policy Foundation Tabulation of Census Bureau/ Bureau of Labor Statistics Current Population Survey (Mar. 2003) (microdata records public use file at http://www.bls.census.gov/cps/cpsmain.htm).

this Court were to adopt a rule allowing disparate impact claims under the ADEA, similar prudence would dictate that employers also monitor their selection practices for age-based adverse impact. As a practical matter, however, such monitoring would be exceedingly difficult in the age context, and to achieve and maintain statistical parity by age would be virtually impossible, since the age composition of any given group is constantly changing and never static from one day to the next.

A related problem is that, because age is a continuous variable rather than a dichotomous one, it may be used to divide individuals into innumerable groupings for purposes of comparisons. While any employer's workforce can be divided neatly into two groups--those who are within the ADEA's protection and those who aspire to be—simple, two-group comparisons may not be sufficient for ADEA purposes. For, under this Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*, 517 U.S. 308 (1996), comparators for purposes of assessing potential age discrimination need not be outside the protected class.

Thus, the statistical comparisons on which disparate impact analyses depend present serious problems in the age context, *see, e.g.*, Ramona L. Paetzold & Steven L. Wilborn, *The Statistics of Discrimination* § 7.11 (West 2002). Yet efforts to correct for such problems through the use of statistical techniques such as "age-break analysis" (*i.e.*, comparisons based on selected age subgroups) are prone to yield unreliable and even "paradoxical" results. *Id.* at § 7.03.

As the Second and Eighth Circuits have concluded, comparing age subgroups simply does not work. *Criley v. Delta Air Lines, Inc.*, 119 F.3d 102, 105 (2d Cir. 1997); *EEOC v. McDonnell Douglas Corp.*, 191 F.3d 948, 951

(8th Cir. 1999). In *McDonnell Douglas*, the Eighth Circuit elaborated:

> [I]f disparate-impact claims on behalf of subgroups were cognizable under the ADEA, the consequence would be to require an employer engaging in an [sic] RIF to attempt what might well be impossible: to achieve statistical parity among the virtually infinite number of age subgroups in its work force. Adoption of such a theory, moreover, might well have the anomalous result of forcing employers to take age into account in making layoff decisions, which is the very sort of age-based decision-making that the statute proscribes. . . . We have held that employment decisions motivated by factors other than age (such as retirement eligibility, salary, or seniority), even when such factors correlate with age, do not constitute age discrimination. We certainly do not think that Congress intended to impose liability on employers who rely on such criteria just because their use had a disparate impact on a subgroup.

Id. (citations omitted).

Although the Eighth Circuit's discussion in *McDonnell Douglas* was aimed specifically at the problems associated with disparate impact analysis in the context of age subgroups, the same sorts of practical difficulties surround any use of the disparate impact theory under the ADEA. Attempting to discern whether a business practice has produced an unintended, yet adverse, effect on some group of older workers—whether it be the entire class of those 40 and older or some subgroup—necessarily would require age-based analyses of the employer's entire workforce, since the class of protected persons is guaranteed to change every day. Congress certainly did not mean to impose such an onerous—if not utterly impossible—task on employers under the ADEA, whose aim was to prohibit only arbitrary, intentional ageism.

B. Because Age Correlates with Numerous, Legitimate Factors Used To Differentiate Among Employees, a Rule Allowing Disparate Impact Claims Under the ADEA Would Severely Hamper the Ability of Employers To Manage Their Businesses

To a far greater extent than other legally-protected traits, age routinely correlates with factors employers legitimately use to differentiate among individuals in the workplace, including seniority, experience, educational attainment, salary levels and many others. Indeed, as the Seventh Circuit has noted, "virtually all elements of a standard compensation package" correlated with age and, therefore, could not be curtailed in times of business adversity without creating prima facie violations of law if the disparate impact theory were recognized under the ADEA. *Finnegan v. Trans World Airlines, Inc.*, 967 F.2d 1161, 1164-65 (7th Cir. 1992). The court concluded that such a construction of the ADEA would lead to results so patently unsatisfactory—indeed, "so remote from the objectives of civil rights law"—that it must be rejected. *Id.* at 1165.

Again, because of the progressive nature of age—especially when coupled with normal career patterns and the inexorable, albeit individualized, physical effects of aging—there are innumerable, facially-neutral selection criteria and other employment practices whose effects on individuals will differ depending on their age at the time a business decision is made. *Ellis v. United Airlines*, 73 F.3d at 1009; *see also* Miles F. Archer, Case Note, *Mullin v. Raytheon Company: The Threatened Vitality of the Disparate Impact Theory Under the ADEA*, 52 Me. L. Rev. 149, 171 (2000). As a result of these correlations, the practical effect of a rule allowing disparate impact claims under the ADEA would be to limit severely the ability of business managers to implement decisions of the sort they are required to make day-in and day-out.

For example, workforce reductions designed to cut salary and benefit costs could be in jeopardy under an ADEA/ disparate impact theory, because older workers tend to have higher salaries and more expensive benefits. Similarly, restructurings designed to make management more efficient and less top-heavy could be in trouble, because higher-level positions tend to be held by older individuals. Likewise, plant closings, relocations of operations, and changes in operating methods or technologies that result in significant employee turnover all could be challenged, because newly-hired employees at all levels are likely to be younger on average than the incumbents they replace, simply as a result of the normal operation of the labor market. Finally, salary plan adjustments designed to improve an organization's competitiveness in hiring and retention of employees in entry-level and relatively low-level positions could be vulnerable to disparate impact analysis, because those positions are likely to be held by relatively young workers.

It is no real solution to say that employers might be able to avoid liability for such actions by showing that the factors they relied upon were reasonable or that they were justified by business necessity (and perhaps also rebutting assertions that there were alternatives through which they could have achieved their legitimate business objectives with less adverse impact on older workers), as would be required in a Title VII disparate impact case. For, given the costs and uncertainties of litigation, the reality is that, if employers know a potential for ADEA liability under the disparate impact theory is in the picture, many will feel compelled to manage their businesses in such a way as to come as close as possible to age-parity with respect to the impact of all such decisions, as difficult and limiting as that may be. This

simply cannot be a result that Congress intended in enacting the ADEA.

CONCLUSION

For the foregoing reasons, the Court should affirm the decision below.

Respectfully submitted,

ANN ELIZABETH REESMAN
MCGUINESS NORRIS & WILLIAMS, LLP
1015 Fifteenth St., N.W., Suite 1200
Washington, DC 20005
(202) 789-8600

Attorneys for *Amicus Curiae*
Equal Employment Advisory Council

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